Syarikat Bekalan Air Selangor Sdn Bhd v Liew Lai Yin

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–1473 OF 2006
MARY LIM JC
12 FEBRUARY 2010

Tort — Conversion — Claim in conversion — Treated water — Action against defendant for unlawfully taking water treated by plaintiff — Whether plaintiff could maintain action in conversion — Liability — Whether absolute or strict — Whether knowledge relevant — Whether case proven on balance of probabilities

The plaintiff's claim against the defendant was based on the tort of conversion. The plaintiff claimed that the defendant had without its authority or permission taken water treated by the plaintiff to property belonging to the defendant, ie, at Lot 806, Kg Baru Salak South, Kuala Lumpur. According to PW1, the investigating officer, he discovered that a water hydrant had been removed and in its place, a 4 inch pipe had been used to connect water from the mains to Lot 806. PW1 testified that when he arrived at Lot 806, he met the owner of the premises, a person by the name of Mr Liew Lai Yin ('Liew'). Liew was said to have told PW1 that since the pipes broke in 2003 and despite numerous complaints, the pipes had not been repaired, he then resorted to unlawfully connecting the pipes in the manner described. The water from that connection was then piped into a nearby pool. The defendant however, contended that the plaintiff's claim ought to be dismissed for the following reasons; (a) the failure to call Liew as witness or explain his absence; (b) the photographs taken at the material time and tendered at trial were of no probative value as they did not show any coherent evidence of any relevant fact; and (c) the failure of the plaintiff to show that the water that was said to be wrongfully connected had indeed been channelled to the defendant's property.

Held, allowing the plaintiff's claim with costs:

(1) The defendant would be liable regardless whether he knew, or had reason to know, or could not by the reason of the exercise of reasonable care have known of the 'neighbour's interest in the goods'. In other words, the liability was absolute or strict. All the plaintiff has to do in a claim founded on conversion is prove that the defendant dealt with the plaintiff's water, in a manner inconsistent with the plaintiff's rights, and that there is intention on the part of the defendant to deny the plaintiff's right. The state of the defendant's knowledge was irrelevant (see para 9).

(2) Although the photographs taken at the time of the investigation did not clearly show the connections between the site of the fire hydrant and Lot 806, nevertheless the evidence of PW1 who testified on what he saw and found as a result of his investigation was acceptable. The photographs were but supportive and corroborative evidence of the narration of the witness who had satisfactorily explained what he saw and did at the material time at Lot 806 (see para 13).

(3) The case of the plaintiff was not dependent on the admission of wrongdoing by Liew. It depended on the silent uncontroverted evidence of the 4 inch pipes which lead from the site of the fire hydrant wrongfully removed to the premises located on Lot 806 and through which water of the plaintiff was channelled and consumed or used (see para 14).

(4) There was clear evidence of the tort and the defendant's wrongdoing. The defendant had also used the water over a period of time including keeping the water in the pool identified. The facts did not indicate a lack of innocence on the part of the defendant but on the contrary showed deliberate wrongful acts in direct usurpation of the proprietary and possessory rights of the plaintiff over the water at the material time (see para 14).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah berdasarkan tort konversi. Plaintif mendakwa bahawa defendan, tanpa kebenaran atau kelulusannya telah mengambil air yang telah diproses oleh plaintif ke hartanah yang dimiliki oleh defendan, iaitu di Lot 806, Kg Baru Salak South, Kuala Lumpur. Menurut PW1, pegawai penyiasat, dia mendapati bahawa satu pili air telah dicabut dari tempatnya, satu paip berukuran 4 inci telah digunakan untuk mengalirkan air daripada paip utama ke Lot 806. PW1 memberi keterangan bahawa apabila dia sampai di Lot 806, dia telah berjumpa dengan pemilik premis tersebut, Encik Liew Lai Yin ('Liew'). Liew dikatakan telah memberitahu PW1 bahawa sejak paip tersebut bocor pada 2003 dan setelah beberapa aduan, paip tersebut tidak dibaiki, dia kemudiannya, secara salah, menyambung paip tersebut sebegitu. Air daripada sambungan tersebut kemudiannya disalurkan ke kolam yang berhampiran. Defendan, walau bagaimanapun menghujah bahawa tuntutan plaintif harus ditolak atas sebab-sebab berikut; (a) kegagalam memanggil Liew sebagai saksi atau menjelaskan ketidakhadirannya; (b) gambar-gambar yang diambil pada masa yang material dan dikemukakan semasa perbicaraan tidak mempunyai nilai pembuktian kerana tidak menunjukkan keterangan koheren berkenaan apa-apa fakta yang relevan; dan (c) kegagalan plaintif menunjukkan bahawa air yang dikatakan telah disambung dengan salah sememangnya disalirkan ke hartanah defendan.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Defendan akan bertanggungan sama ada dia tahu, atau mempunyai

sebab untuk tahu, atau tidak tahu, disebabkan oleh pelaksanaan kewajipan berjaga-jaga, 'neighbour's interest in the goods'. Atau dalam kata lain, liabiliti itu adalah mutlak atau ketat. Apa yang plaintif harus lakukan dalam tuntutan berdasarkan konversi ialah membuktikan bahawa defendan menggunakan air plaintif dalam cara yang tidak konsisten dengan hak-hak plaintif, dan bahawa defendan berniat untuk menafikan hak plaintif. Kedudukan pengetahuan defendan tidak relevan (lihat perenggan 9).

(2) Walaupun gambar-gambar yang diambil pada masa siasatan tidak menunjukkan dengan jelas sambungan antara tempat pili bomba dan Lot 806, tetapi keterangan PW1 yang telah memberi keterangan tentang apa yang dilihat dan dijumpai sebagai hasil siasatannya boleh diterima. Gambar-gambar tersebut merupakan keterangan yang menyokong pernyataan saksi tersebut yang telah menjelaskan dengan secukupnya apa yang dilihat dan dilakukan pada masa yang material di Lot 806 (lihat perenggan 13).

(3) Kes plaintif tidak bergantung kepada pengakuan salah Liew. Kesnya bergantung kepada keterangan kukuh kewujudan paip 4 inci dari tempat pili bomba yang telah dicabut secara salah dan dialihkan ke premis yang terletak di Lot 806 yang mana air plaintif disalirkan dan digunakan (lihat perenggan 14).

(4) Terdapat keterangan jelas tentang kesalahan tort dan kesalahan defendan itu. Defendan juga telah menggunakan air tersebut untuk satu jangka masa dan menyimpan air tersebut dalam kolam yang telah dikenalpasti itu. Fakta-fakta tidak menunjukkan bahawa defendan tidak bersalah tetapi sebaliknya menunjukkan tindakan-tindakan salah yang disengajakan untuk merampas hak-hak proprietari dan milikan plaintif secara langsung terhadap air tersebut pada masa yang material itu (lihat perenggan 14).]

Notes

For a case on claim in conversion, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 93.

Cases referred to

Aitken Agencies Ltd v Richardson [1967] NZLR 65 (refd)

Development & Commercial Bank Bhd v Liew Weng Hang & Ors [2007] 6 CLJ 260, CA (refd)

Hollins v Fowler (1875) LR 7 HL 757 (refd)

Kuwait Airways Corporation v Iraqi Airways Co [1999] CLC 31, CA (refd)

Marfani & Co Ltd v Midland Bank Ltd [1968] 1 WLR 956, CA (refd)

Legislation referred to

Water Supply Enactment 1997

Habizan Rahman (Kadir, Andri & Partners) for the plaintiff.
Peter Siew (Peter Siew & Tan) for the defendant.

Mary Lim JC:

[1] The plaintiff's claim is based on the tort of conversion. The plaintiff claims that the defendant had without its authority or permission taken water treated by the plaintiff at property belonging to the defendant, that is, at Lot 806 Jalan 33, Kg Baru Salak South, Kuala Lumpur ('Lot 806'). The defendant denies the claim and asserts that if there was such wrongful utilisation or unauthorised use, she was not aware of the same.

[2] The plaintiff called two witnesses, one of whom visited Lot 806 at the material time as part of the plaintiff's investigation while the other testified as to the calculation of the amount due from the defendant.

[3] According to the evidence of Encik Zainuddin bin Abdul Hamid (PW1), who was the assistant investigating officer in the team sent to investigate a complaint of connecting water supply without a meter or illegal water connections, PW1 found that a water hydrant had been removed and in its place, a 4 inch pipe had been used to connect water from the mains to Lot 806. In his evidence-in-chief, PW1 testified that when he arrived at Lot 806, he met the owner of the premises, a person by the name of Mr Liew Lai Yin. Mr Liew is said to have told PW1 that since the pipes broke in 2003 and despite numerous complaints, the pipes had not been repaired, he then resorted to unlawfully connecting the pipes in the manner just described. The water from that connection was then piped into a nearby pool. Mr Liew was not called to testify nor was there any explanation offered to explain his absence.

[4] Mr Peter Siew, learned counsel for the defendant submitted that the plaintiff's claim ought to be dismissed for several reasons. First, the failure to call Mr Liew Lai Yin or explain his absence. Second, the photographs taken at the material time and tendered at trial were of no probative value as the photographs do not show any coherent evidence of any relevant fact. The evidence was said to be fragmented leaving the court to speculate and imagine what were the conditions on the ground. In addition, the plaintiff had not shown that the water that was said to be wrongfully connected had indeed been channeled to the defendant's property. There were many other properties adjacent to Lot 806 and without such critical evidence, the claim has not been proved and cannot therefore succeed.

[5] Having heard the oral evidence and having carefully scrutinised that evidence together with the documentary evidence together with the submissions of both counsel, this is my decision. A

[6] In a claim founded on the tort of conversion, Diplock LJ in *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 said at pp 970–971: B

> At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of reasonable care have known of his neighbor's interest in the goods. This duty is absolute; he acts to his peril. C

[7] In similar vein, the Court of Appeal in *Development & Commercial Bank Bhd v Liew Weng Hang & Ors* [2007] 6 CLJ 260 at p 265 cited the decision of *Hollins v Fowler* (1875) LR 7 HL 757 where Lord Chelmsford said: D

> any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion. E

[8] The tort of conversion, which in the law of crimes would have found parallels in the offence of theft, can be committed in respect of any type of goods. For example, in *Kuwait Airways Corporation v Iraqi Airways Co* [1999] CLC 31, the defendants' pilots ferried aircraft expropriated by the Iraqi forces from Kuwait to Basra in Iraq. This was held to be amount to conversion of the aircraft involved. In *Aitken Agencies Ltd v Richardson* [1967] NZLR 65 where the court found conversion where the defendant took the plaintiff's car for just a 'joy-ride'. Here, the commodity or goods in question is water or treated water which the plaintiff under the Selangor Water Supply Enactment 1997 was authorised to supply to the consumers in the State of Selangor, and the Federal Territories of Kuala Lumpur and Putrajaya. For this purpose, the plaintiff manages, operates, or is allowed to use or operate a water supply system and services and to handle or manage the facilities related to that supply. The plaintiff is also entitled to collect charges for such supply of the water which it stands possessed. F G H

[9] Insofar as liability for the tort of conversion is concerned, it can be readily gathered from the authorities discussed, a defendant remains liable regardless whether the defendant knew, or had reason to know, or could not by the reason of the exercise of reasonable care have known of the 'neighbour's interest in the goods'. In other words, the liability is absolute or strict. All the I

plaintiff has to do in a claim founded on conversion is prove that the defendant dealt with the plaintiff's water, so to speak, in a manner inconsistent with the plaintiff's rights, and that there is intention on the part of the defendant to deny the plaintiff's right. The state of the defendant's knowledge is irrelevant.

[10] It is not in dispute that the defendant owns Lot 806 at the material time. Some controversy seems to have arisen as to how she became the owner of the property. The defendant testified that she became owner by a transfer from her late father, Liew Chee Kong whereas a search at the land office shows a transfer from one Soon Fan Chong to the defendant on 23 July 1996. As far as I am concerned, how the defendant received title to Lot 806 is immaterial because the claim is not dependent on this. What is more important is that the defendant was the undisputed registered owner at the material time, that time being when the wrongful connections as described by PW1 were discovered. This disparity, however points to the defendant's credibility as a witness.

[11] Now, much of the defendant's examination-in-chief elicited answers of 'I don't know' and there is also a fair share of that in cross-examination. In her examination-in-chief, the defendant said she was not aware what Lot 806 was used for and neither was she aware of what happened to the premises located on her property. However, in cross-examination, she found no difficulty in identifying that the premises, being factories as seen in the photographs taken by the plaintiff were located on Lot 806. The defendant also agreed that she applied for water to be supplied by the plaintiff to Lot 806 in September 2005, after the investigations by the plaintiff on 28 July 2005. She further agreed that the supply of water to Lot 806 was for industrial use. She however denied renting out Lot 806.

[12] Taking all this evidence from both principal witnesses, PW1 on the one hand and the defendant on the other, it is difficult to accept that the defendant was as unaware or as ignorant as she claimed. To my mind, since the defendant has denied renting out Lot 806 and from her spontaneous recognition of the buildings upon her property, coupled with her specification of the use of the water to be supplied to Lot 806, it can safely and reasonably be concluded that the defendant was well aware of the goings-on on Lot 806. Why else would anyone open an account with the plaintiff in one's name for the supply of water to Lot 806 when one does not reside on the property? The defendant must be taken to be aware of the kind of activity taking place on Lot 806, that is, there are factories which the defendant herself had identified as located on site Lot 806 and that these factories require water for 'industrial use'.

[13] Although the photographs taken at the time of the investigation do not clearly show the connections between the site of the fire hydrant and Lot 806, I accept the evidence of PW1 who testified on what he saw and found as a result of his investigations. Photographs are but supportive and corroborative evidence of the narration of the witness who has satisfactorily explained what he saw and did at the material time at Lot 806. And PW1 has explained that he found a 4 inch pipe wrongfully connected to the plaintiff's mains in the manner described. He said: 'Kami juga mendapati bahawa Defendan telah membuat sambungan secara menyalahi undang-undang dari paip perkhidmatan ke satu salur utama milik Plaintif ke premis Defendan dengan membuat sambungan paip dengan mengeluarkan pili bomba secara tidak sah dengan memotong dan menggunakan paip bersaiz 4 inci. Sambungan tersebut dilakukan tanpa pengetahuan atau kebenaran daripada Plaintif.' That narration of PW1 is the best evidence and I do not find any inconsistency in PW1's testimony nor was it so suggested by learned counsel for the defendant. His evidence is credible and supports the plaintiff's claim.

[14] In the defence filed, I note that the defendant also claimed no responsibility for the acts of third parties. This seems to infer that someone else could have been responsible for the acts alleged of and that the defendant played no part in the wrong. But, the defendant has not led any evidence to support this allegation. There is after all, this elusive Mr Liew Lai Yin or whatever his name may really be who was occupying the defendant's Lot 806 at the material time. Though this name arises in PW1's report, the case of the plaintiff is not dependent on the admission of wrongdoing by this Mr Liew. It depends on the silent uncontroverted evidence of the 4 inch pipes which lead from the site of the fire hydrant wrongfully removed to the premises located on Lot 806 and through which water of the plaintiff was channeled and consumed or used. It is a case of following the trail. And the trail led to the defendant's Lot 806 for which no satisfactory or in fact any explanation has been forthcoming. Since the defendant has denied tenanting out Lot 806 and there being also no payment for such water drawn, I am satisfied that no one other than the defendant is involved in the matters alleged by the plaintiff. The defendant remains responsible for wrongfully obtaining possession of the plaintiff's treated water by the removal of the fire hydrant, replacing it with the 4 inch pipe which connected to the defendant's premises, including the pool and the water tank. The plaintiff has not consented, authorised or agreed in any manner whatsoever to the defendant's acts as described. There is to me, clear evidence of the tort and the defendant's wrongdoing. The defendant has also used the water over a period of time including keeping the water in the pool identified. The facts do not indicate a lack of innocence on the part of the defendant but on the contrary show deliberate wrongful acts in direct usurpation of the proprietary and possessory rights of the plaintiff over the water at the material time.

[15] From the evidence adduced and for the reasons given, I am satisfied that the plaintiff has proved its case on a balance of probabilities. I do not find this a suitable case to import the applications of exceptions to this principle of strict liability. The defendant is guilty of the tort of conversion and this extends to the destruction of the fire hydrant.

[16] Insofar as quantum is concerned, I would like to make an observation. The lawful land use for Lot 806 is 'residential' while the actual use is for industrial. I am conscious of the role of the courts in ensuring that the courts are not used as an avenue to enforce or encourage wrongs. This fact however does not appear to be within the knowledge of the plaintiff at the material time. In any case, the defendant should not be allowed to benefit from her own wrong in this respect. With the concession of learned counsel for the plaintiff that the actual period of wrongful use by the defendant is 453 days, that is from the date when the account was terminated (24 April 2004) to the date when the account was opened (15 September 2005), I hereby allow the plaintiff's claim of RM163,862.78 together with RM2,000 as operation costs which I find reasonably accounted for. I further award interest on the total sum at the rate of 4%pa from 29 July 2005 till the date of judgment and thereafter at 8%pa until the date of realisation. Lastly, I allow costs of RM5,000.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed